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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 267

ADAM BAGDASIAN, *Petitioner*,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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July 28, 1961.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

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No.

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UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioner Adam Bagdasian prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in the above-entitled case on May 29, 1961.

CITATION TO OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit, dated May 29, 1961, is not yet reported. A copy thereof is annexed to this petition as Appendix A.

The opinion of the United States District Court for the District of Maryland (Chief Judge Roszel C. Thomsen) is reported at 188 F. Supp. 683 and is appended to this petition as Appendix B.

JURISDICTION

The judgment of the Court of Appeals was entered on May 29, 1961. On June 20, 1961, the Chief Justice of the United States signed an order extending the time for filing this petition for a writ of certiorari to and including July 28, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether an indictment charges a crime under 18 U.S.C.A. § 1343 which merely alleges that certain representations with respect to a scheme to defraud were knowingly false and fraudulent without asserting that such representations were made with fraudulent intention and were incapable of being fulfilled.[1]

STATUTE INVOLVED

The statute involved is 18 U.S.C.A. § 1343, headed "Fraud by wire, radio, or television", which reads as follows:

> "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than a $1,000 or imprisoned not more than five years, or both."

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[1] In the event that certiorari is granted as to this question, petitioner reserves the right to urge, as he did in the court below, that there was a material and prejudicial variance between the indictment and the proof and that there was insufficient evidence to support the finding of guilt.

STATEMENT OF THE CASE

Petitioner was charged, in a 13-count indictment returned under 18 U.S.C.A. § 1343, with having "unlawfully and knowingly devised and intended to devise a scheme and artifice to defraud and for obtaining money by means of false and fraudulent pretenses, representations and promises" and with using interstate telephone and telegraph facilities on specified occasions for the purpose of executing such scheme.

More particularly, it was alleged that petitioner falsely represented to one Allen and one Culpepper that he was employed as a manager of a bookmaking establishment and was in a position to cheat his employer by changing office records after certain horse races had been run so as to make it appear that bets had been placed on winning horses. Petitioner allegedly visited Allen and Culpepper in Virginia and proposed to them that they permit him to place such bets in their names and that they split their winnings with him. Thereafter petitioner allegedly made numerous telephone calls from Maryland to Virginia in which he made various false statements to induce Allen and Culpepper to put up money in furtherance of the plan; and he actually persuaded Culpepper to send him by telegraph from Virginia to Maryland five Western Union money orders in the total sum of $8,500.

The trial took place without a jury and petitioner did not take the stand in his defense. Both Allen and Culpepper testified that the representations had been made to them and that they agreed to join in the scheme to defraud the bookmaker, said to be petitioner's employer, with the understanding that any profits would be shared with petitioner. The trial judge found the petitioner guilty on each of the last 7 counts of the

indictment and not guilty as to the first 6 counts. See Appendix B hereto; 188 F. Supp. 683. The sentence imposed was imprisonment for one year on each count, the terms of imprisonment to run concurrently. The Court of Appeals affirmed the judgment of conviction, Appendix A hereto, holding *inter alia* that the indictment properly charged an offense under 18 U.S.C.A. § 1343.[2]

REASONS FOR GRANTING THE WRIT

The judgment of the Court of Appeals affirming petitioner's conviction raises an important and unresolved question in the interpretation and application of 18 U.S.C.A. § 1343. It is a question which constantly arises under this statute and under the closely related mail fraud statute, 18 U.S.C.A. § 1341, and deserves consideration and resolution by this Court. See *Kann* v. *United States*, 323 U.S. 88; *Parr* v. *United States*, 363 U.S. 370.

This question springs from the common practice of framing indictments under these statutes in the language of the enactments with reference to the false or fraudulent representations alleged to have been made. In this case, the indictment asserted that petitioner made various statements and representations all of which "were false and fraudulent and were at all times known by him to be false and fraudulent." But nowhere was it alleged that these representations were false and fraudulent in the basic sense that petitioner

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[2] The United States conceded that this issue was properly before the Court of Appeals even though it had not been raised in petitioner's motion to dismiss the indictment. Brief of United States in Court of Appeals, pp. 7-8. In any event, the Court of Appeals did decide the issue.

never intended to carry them out or lacked the means to execute them.

The absence of such an allegation is important, in terms of pleading an essential element of the offense and of enabling the defendant to prepare his defense, in situations where the alleged representations are capable of being carried out to the point where no violation of the fraud statutes takes place. Thus here, if petitioner intended to and was capable of fulfilling his representations, a conspiracy with Allen and Culpepper to defraud the bookmaker would have taken place, but it would not have been a crime or conspiracy outlawed by 18 U.S.C.A. § 1343. Whatever violation of state law or even some other federal law may have then occurred, 18 U.S.C.A. § 1343 would not have been violated.[3] As was said in relation to the mail fraud statute, § 1343 "does not purport to reach all frauds, but only those limited instances in which the use of the mails [or interstate telephone and telegraph facilities] is a part of the execution of the fraud, leaving all other cases to be dealt with by appropriate state law." *Kann* v. *United States*, 323 U.S. 88, 95. See also *Parr* v. *United States*, 363 U.S. 370, 389-390, 393-394.

In other words, is it enough merely to allege fraud and falsity in the representations without alleging that petitioner did not honestly intend to use, and did not in fact use, the money for the purposes he stated? Does not the cry of fraud merely cover an incomplete crime under § 1343, a crime that becomes complete only if it is alleged that the representations were false in the sense that they were not intended or designed to be

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[3] "Statutes creating crimes are to be strictly construed in favor of the accused; they may not be held to extend to cases not covered by the words used." *United States* v. *Resnick*, 299 U.S. 207, 209.

fulfilled? Any less complete charge of fraud tends to become an insufficient assertion that the representations, however sincere, were simply not carried out and for that reason were false and fraudulent.

Thus the charges of fraud and misrepresentation in these situations, without more, inevitably become the generator of a determination of the morality of the accused's actions rather than of his guilt under the statute. Without pinpointing the gist and substance of the fraud—*i.e.*, the bad intentions of the accused and his incapacity to fulfill his representations—the morality and seeming unreasonableness of the representations become the focal points of the adjudication. But as stated in *United States* v. *Post*, 113 Fed. 852, 854 (S.D. Fla.):

> ". . . in all offenses of this character, the intention of the defendant is the very gist and substance of the fraud which must necessarily be embodied in the scheme or artifice as a foundation of the violation of the law. Without such fraudulent intention, it would be impossible to devise a scheme to defraud. The very term necessarily implies a fraudulent intention from the very inception of the scheme, and no indictment that does not negative the good faith and honest belief of the defendant can be sufficient. No matter how fraudulent or criminal any act or series of acts may appear by implications, or how repugnant to enlightened intelligence and morality it may appear by a general statement of a case, no person should be put upon issues not clearly alleged. In this case the dishonest and fraudulent intentions of the defendant would be the question to be passed upon by the jury and should be clearly stated."

See also *Hass* v. *United States*, 93 F. 2d 427, 432 (C.A. 8), where the indictment not only alleged that the

representations were false and that the defendants knew them to be false but stated why the representations were false.

The problem raised by the judgment below goes to the very heart of fair criminal pleading—the requirement that the essential elements of the offense be alleged with sufficient clarity and specificity to enable the accused to frame his defense. *United States* v. *Debrow*, 346 U.S. 374; *Bartell* v. *United States*, 227 U.S. 427; *United States* v. *Hess*, 124 U.S. 483. Without knowing from the indictment that his good intentions are the very gist of the crime, the accused has no adequate opportunity to develop a defense with respect to such intentions.

Since this problem is a recurring one of obvious importance in the administration of the criminal fraud statutes and since no definitive resolution of the problem has been made by this Court, review of the judgment below by writ of certiorari becomes appropriate.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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July 28, 1961.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 8255

UNITED STATES OF AMERICA, *Appellee*,

v.

ADAM BAGDASIAN, *Appellant*.

Appeal from the United States District Court for the District of Maryland, at Baltimore
Roszel C. Thomsen, District Judge

(Argued April 19, 1961 Decided May 29, 1961.)

Before SOBELOFF, Chief Judge, and HAYNSWORTH and BOREMAN, Circuit Judges.

James B. Murphy and Solomon B. Levin for Appellant, and Robert E. Cahill, Assistant United States Attorney, (Joseph D. Tydings, United States Attorney, on brief) for Appellee.

SOBELOFF, Chief Judge:

This appeal by Adam Bagdasian reveals a picaresque story of a fraud effectively perpetrated upon one who was willing to join in a scheme to defraud another. The defrauder, who is the appellant here, was tried without a jury and convicted on seven of the thirteen counts of an indictment charging him with devising a scheme to defraud and using interstate telephone and telegraph facilities for the purpose of executing such scheme, in violation of Title 18 U.S.C.A. section 1343.[1] The sentence was imprisonment for

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[1] 18 U.S.C.A. § 1343 reads as follows:

"§ 1343. Fraud by wire, radio, or television

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises,

one year on each count, the terms of imprisonment to run concurrently.

There was testimony tending to show that Bagdasian separately approached E. R. Culpepper of Norfolk, Virginia, and John Allen of Newport News, Virginia, and falsely represented to each that his name was George Simon, that he was employed as manager by a bookmaker, and was in a position to cheat his employer by changing office records after races had been run, so as to make it appear that bets had been placed on winning horses. He told Culpepper and Allen that if they phoned in their bets to a certain telephone number in Takoma Park, Maryland, which he supplied them, he, Bagdasian, could and would arrange to place their bets on horses that had already won. The plan he proposed called for equal division of the spoils between himself and the bettor.

Culpepper was completely taken in. Initially, he was induced by Bagdasian to wire $1,500 from Norfolk to the Western Union Company office in Annapolis, Maryland, to be picked up by Bagdasian in the name of Larry Ford. Bagdasian later influenced Culpepper to wire additional sums to "Larry Ford" in care of the same Western Union office. Culpepper was persuaded to advance these additional monies by Bagdasian's representations that Culpepper had won various sums aggregating over a short period $26,000, but that for one reason or another it was necessary for Culpepper to advance more money before he could get his winnings. It was shown that Bagdasian, identifying himself as Larry Ford, personally collected from Western Union the monies so transmitted. Altogether, as a result of the various transactions, Culpepper was cheated out of

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transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both. Added July 16, 1952, c. 879, § 18(a), 66 Stat. 722, amended July 11, 1956, c. 561, 70 Stat. 523."

$8,500 instead of sharing in the expected looting of Bagdasian's supposed bookmaker employer, who has never been found to exist.

Allen, on the other hand, testified that he never accepted the proposal to defraud Bagdasian's employer, but that he did place bets with the defendant, thinking that he was employed by a bookmaker. He was not required to put up betting money in advance, since Bagdasian told him, with simulated graciousness, that he had satisfied himself of Allen's financial responsibility. Apparently Allen had some independent knowledge or advice about racing, or was fortunate, and did phone in bets on horses that turned out to be actual winners. Then he was told by Bagdasian that he had won, but that it would now be necessary for him to put up a deposit of $5,000 before he could collect his winnings. More wary than Culpepper, Allen put up no money and was content to forego the reported winnings.

On this appeal Bagdasian asserts (1) that the indictment does not properly charge the offense; (2) that there was a fatal variance between indictment and proof; and (3) that the evidence is not legally sufficient to support the verdict.

As to the indictment, it was pointed out preliminarly that it does not allege that the defendant converted the money to his own use; but the short answer is that this is not an essential part of the crime of devising a fraudulent scheme and using interstate wire facilities for the purpose of executing such scheme.

The principal fault found with the indictment by the appellant is that after reciting the representations made by the defendant to his intended victims, and averring that they were false and known by the defendant to be false, the indictment fails to show "*why* the representations alleged to be false were false in fact." Appellant's counsel explained that by "why" as here used, he means wherein, or in what respect. The point attempted to be made is that the indictment should have continued with a recital of the

opposite of the representations, such as that the defendant was in fact not employed by the bookmaker, that he was not in a position to change losing bets into winners after the race had been run, etc. We do not perceive how in this case such a form of traverse would have been more enlightening than the allegation that was embodied in each count, namely, "that each and all of the pretenses, representations and promises made by the defendant, as listed [in the preceding paragraph] . . . were false and fraudulent and were at all times known by him to be false and fraudulent."

It is, of course, a fundamental requirement in criminal pleading that every element of an offense must be charged with sufficient clarity and specificity to enable the defendant to prepare his defense and to plead the judgment of conviction or acquittal in bar of a subsequent prosecution for the same offense. *United States* v. *Debrow*, 346 U.S. 374 (1953). We think, however, that this indictment meets these requirements.

The defendant, in support of his contention, relies on *Hass* v. *United States*, 93 F. 2d 427 (8th Cir., 1937), but that case is no authority for holding the present indictment insufficient. It is true that in *Hass*, wherein the indictment was upheld, the court noted that the defendant was informed how the representations were false. The court, however, did not intimate that a more detailed specificity than we have here is required. This is not a case in which representations attributed to a defendant involve many complicated details and he might not know in what respect the representation is claimed by the prosecutor to be false. All that was here required was the plain negation of the alleged misrepresentations which are unitary and uninvolved.

Likewise inapposite is *United States* v. *Post*, 113 F. 852 (D.C.S.D., Fla., 1902), cited by the defendant, where the charge was a scheme to defraud by promising to "cure all diseases and poverty by mental science," but the defend-

ant's good faith was not negatived. A later indictment against the same defendant, which did charge falsity to the defendant's knowledge, was upheld on appeal. *Post* v. *United States*, 135 F. 1 (5th Cir., 1905).

Finally, it is to be noted that the draftsmen of the present indictment followed closely form 3 suggested in the Appendix of Forms of the Federal Rules of Criminal Procedure, 18 U.S.C.A.[2] Also, a mail fraud indictment was sustained against a like attack in *United States* v. *Whitmore*, 97 F. Supp. 733, 737 (D.C.S.D. Cal., 1951).

We need not dwell upon the appellant's contention that there was a variance between the charges made in the indictment and the proof. It is argued that the evidence in fact showed a scheme between Bagdasian, Culpepper and Allen to cheat Bagdasian's employer, of whose actual existence there is no evidence. The Judge, however, was well justified in his view of the evidence that the plan to cheat the "employer" was a fiction held out to bait Culpepper and Allen, and that Bagdasian's real scheme was to cheat them by pretending that he was in league with them to cheat someone else.

The evidence amply supports the District Judge's verdict, despite the alleged discrepancies in the testimony. At most, the matters stressed go only to the credibility of witnesses —an issue not reviewable here. See *United States* v. *Bagdasian*, 188 F. Supp. 683 (D.C. Md., 1960).

Affirmed.

[2] At the bar of this court counsel for the defendant relied upon *United States* v. *Larson*, 125 F. Supp. 360 (D.C. Alaska, 1954), for the proposition that an indictment is not necessarily valid merely because it is drawn in accordance with a form contained in the Appendix of Forms of the Federal Rules of Criminal Procedure. But, cf. *Ochoa* v. *United States*, 167 F. 2d 341 (9th Cir., 1948). The *Larson* case presents no analogy helpful to the defendant here. The present indictment would qualify as full compliance not only with the form but with the general requirements of the law.

Judgment

Filed and Entered May 29, 1961

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 8255

UNITED STATES OF AMERICA, *Appellee*,

v.

ADAM BAGDASIAN, *Appellant*.

APPEAL FROM the United States District Court for the District of Maryland.

THIS CAUSE came on to be heard on the record from the United States District Court for the District of Maryland, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

SIMON E. SOBELOFF
Chief Judge, Fourth Circuit.

CLEMENT F. HAYNSWORTH, JR.
United States Circuit Judge.

HERBERT S. BOREMAN
United States Circuit Judge.

FILED
May 29, 1961

R. M. F. WILLIAMS, JR.
Clerk

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Criminal No. 24837

UNITED STATES OF AMERICA

v.

ADAM BAGDASIAN

Opinion of Court

Thomsen, Chief Judge

Defendant, indicted under thirteen counts for violating 18 U.S.C.A. 1343,[1] has been tried by the court without a jury. In substance the indictment charges that defendant, having devised a scheme to defraud and to obtain money by falsely representing that he was employed as manager of a bookmaking establishment in a position to cheat his employer by placing bets after races had been run, visited John Allen and E. R. Culpepper in Virginia and proposed to them that they permit him to place such bets in their names and that they split their winnings with him; that defendant thereafter made a number of telephone calls from Maryland to Virginia in which he made various false statements to induce Allen and Culpepper to put up money

[1] Sec. 1343 provides:

"Fraud by wire, radio, or television.

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money, or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

in furtherance of the pretended plan, and actually persuaded Culpepper to send him by telegraph from Virginia to Maryland five Western Union money orders in the total sum of $8,500.

Findings of Fact

On July 9, 1957 defendant inspected an apartment at 6906 Westmoreland Ave., Takoma Park, Maryland, and arranged for a lease for the apartment which was made under the name Harold Green. Two days later defendant or a confederate caused the telephone company to furnish telephone service to that apartment, which was assigned the number Juniper 9-2890, listed in the name of Harold N. Green.

Shortly after the middle of 1957, defendant, using the name of George Simon, went to Norfolk and called on E. R. Culpepper, who operated a reducing salon in Norfolk and a building supply business in Suffolk, Virginia. Defendant said that he was working for a rich bookmaker and was in a position to place bets after a race had been run and the winner known. He proposed to Culpepper that the latter "phone in horses" to a given number; that defendant, being in charge of the account, would place the bets on winners after the races were run; and that they would split the winnings half and half. Culpepper agreed to the proposition. Defendant said that a pick-up man named Lou Harris would call on Culpepper the next day and tell him what to do, and would collect and pay off weekly. Lou Harris called on Culpepper the following day, and told him to telephone his bets in to the Juniper number, and to identify himself as "89 for Lou".

After further urging by defendant over the telephone, Culpepper sent in his first bets on or about Wednesday, July 31. That night defendant telephoned, saying they had won $1,400 and that Friday was pay day, but suggesting that since the amount was so small Culpepper "let it go"

until the following week and bet "round robins", described in court as "three-way parlays".

During the next week Culpepper bet $400 or $500 a day on losers and by the end of the week was $3,500 behind. Defendant telephoned Culpepper several times that week explaining that he had been unavoidably out of the office, and in the course of one of the calls told Culpepper to pay the pick-up man $3,500 on Friday, August 9. Culpepper was unable to make this payment, so defendant telephoned on Friday, August 9, and again on Saturday morning, August 10, saying he had borrowed $2,000 and would go on with the arrangement if Culpepper would send $1,500 by Western Union to Annapolis, Maryland, to be picked up by defendant in the name of Larry Ford. Culpepper sent the $1,500 by Western Union Telegraph money order on Saturday, August 10, from Norfolk to Annapolis, using the name of one of his employees as the sender. In accordance with defendant's instructions, Culpepper told Western Union to waive identification, but to ask a test question, the answer to which was "Boat number 101".[2] Defendant picked up the money order at the Western Union office in Annapolis, giving the proper answer to the test question. He then collected the money, endorsing the name Larry Ford on the reverse of the money order.

That night defendant telephoned Culpepper saying that he had gotten the money and they had won $15,000 that day. On Monday, August 12, defendant telephoned Culpepper and persuaded him to send $2,000 by money order from Suffolk to Annapolis to pay off the supposed loan. On Wednesday Culpepper bet on three horses; defendant telephoned him that they had won $11,000 more and that $26,000 would be paid to Culpepper on Friday, August 16. However, defendant telephoned again in Wednesday or

[2] This procedure was followed in each instance when Culpepper sent money by telegraph from Norfolk or Suffolk to Annapolis.

Thursday saying that his boss was upset because the $3,500 had not been paid to the pick-up man on the previous Friday, and that the boss insisted upon a deposit of $5,000. Defendant told Culpepper not to wire the $5,000 in one lump, but to send $2,000, wait a few minutes, send another $2,000, wait a few more minutes and send $1,000, all payable to Larry Ford. Defendant followed these instructions, sending the money by telegraph on Thursday, August 16, from Suffolk to Annapolis, where defendant picked up the money orders and cashed them.

Culpepper did not receive any money from defendant or Harris or anyone else on Friday, August 16, but defendant telephoned saying that he had lost $2,800 of the deposit money in a crap game and that Culpepper would have to send that amount again before he could be paid off. At long last Culpepper realized that he was dealing with a crook, told defendant so, and reported the matter to the F.B.I.

Defendant made essentially the same proposition to John Allen, of Newport News, Virginia, who flirted with the proposition, but never agreed with defendant on the proposed split. Lou Harris called on Allen, gave him the Juniper number, and told him to identify himself as "103 for Lou". Allen testified that he had good sources of information and tips, that he phoned in a number of "legitimate" bets to the Juniper number, that most of his horses won, that defendant called him saying he was entitled to receive some $18,000, but that no money was ever paid to him. Defendant made a number of telephone calls to Allen urging him to accept and act on defendant's proposal, saying that Allen would have to make a deposit of $5,000 before his "legitimate" winnings could be paid and telling a curious story about having pawned a watch and ring belonging to the boss. Allen, however, was wiser than the dog in Aesop's fable, and would not drop his own meat to snatch at a shadow.

Discussion of the Evidence

Defendant was identified by Allen and Culpepper as the George Simon who made the propositions to them in Virginia and later called them repeatedly on the telephone, and by two witnesses as the Larry Ford who picked up and endorsed the several money orders. He was also identified by the witness Daugherty as the man to whom Daugherty had shown the Takoma Park apartment, and by Mrs. Daugherty as the man who signed the lease and who came back later asking about linen service.

Defendant did not take the stand and offered no evidence except that of a handwriting expert who testified that in his opinion defendant did not write the information on the apartment lease which Mrs. Daugherty testified he had written. The government's expert agreed. Neither expert could say whether defendant endorsed the name Larry Ford on the money orders.

Defendant contends that the expert opinion evidence destroys the testimony of Mr. and Mrs. Daugherty that defendant leased the Takoma Park apartment. Mrs. Daugherty was probably mistaken in her testimony that defendant signed the lease agreement and wrote the other information thereon. But it does not follow that Mr. Daugherty was wrong in identifying defendant as the man to whom he showed the apartment, nor even that Mrs. Daugherty was wrong in identifying defendant as the man who inquired about the linen. Other evidence connects defendant with the apartment, and it is clear that a least one other man, Lou Harris, was involved in the scheme. Telephone service for the apartment was arranged for on July 11; Harris gave the number to Allen and Culpepper; Culpepper recognized defendant's voice on one occasion when he called in his bets; on other occasions he heard two or more voices, which sounded alike a "regular bookie place"; the records of the telephone company show four calls to Allen's number and two to Culpepper's number

made from that phone, and two other calls to Culpepper's phone were made from other stations in Maryland and charged to the Juniper number; the tenants abandoned the apartment at the end of the first month, August 9, and it was on or about that date that defendant told Culpepper not to phone in any more bets to the Juniper number, that defendant would put in the horses himself. It should be added that defendant is rather striking in appearance and likely to be remembered.

Defendant also questions the evidence of the two Western Union clerks identifying him as the Larry Ford who picked up the money orders at Annapolis, because one of them said she did not remember being shown any photographs by the F.B.I. agents while the other said that photographs had been shown to both of them. This discrepancy is not fatal, because both witnesses were positive and convicing in their identification of defendant and gave persuasive reasons for recalling the incident—the size and frequency of the money orders and the odd answer to the test question, "boat number 101".

Finally, defendant argues that there is no evidence to show that he was not the manager of a bookmaking office, in a position to do what he said he would do, and that the only scheme proved is a scheme to defraud his employer, in which Culpepper joined but Allen refused to join. There is evidence, however, from which I infer and find that defendant suggested the proposal to cheat his supposed employer as a trap for the unwary, and that he intended to double-cross his ostensible partners, actually his victims, and succeeded in doing so in the case of Culpepper. No payment was made to Culpepper on Friday, August 16, when, according to defendant's statements Culpepper was entitled to receive some $26,000; Allen was never paid his "legitimate" winnings; the proposals to Allen and Culpepper were specious, and the pretended reasons for asking them to send money to defendant were implausible.

Culpepper's testimony illustrates the old Scottish proverb that the greedy man and the swindler are soon agreed.

Although I do not hold against defendant the fact that he did not take the stand, he did not rebut the evidence tending to prove the fraudulent scheme charged in the indictment. If he had in fact been employed as manager of a bookmaking office in or around Washington he could have summoned to this court persons who could testify to that fact. If defendant had intended to cheat his employer he would scarcely have used the office phone to make so many long distance calls to his accomplice; but if he intended to cheat the supposed accomplice it would be natural for him to make such calls from the same number to which his dupes were told to phone their bets. I am convinced beyond a reasonable doubt that defendant devised the scheme charged in the indictment, and in furtherance of the scheme made many long distance calls to Allen and Culpepper in Virginia and induced Culpepper to send him money by telegraph from Virginia to Maryland.

The Several Counts

The first four counts charge telephone calls to Allen on specific dates; the second four counts charge telephone calls to Culpepper on specific dates; the last five counts charge defendant with causing Culpepper to send him by telegraph from Virginia to Maryland the five Western Union money orders offered in evidence.

There is no reasonable doubt about defendant's guilt as charged in the last five counts. Nor is there any reasonable doubt that defendant made many long distance calls to Allen and Culpepper in furtherance of the scheme. But the government furnished an answer to a demand for a bill of particulars of the first eight counts, in which it undertook to give the substance of the several calls which form the basis of those counts. The government proved that calls were made on the dates referred to in counts

two to eight, and that calls were made in which the substance of the conversation was as set out in the particulars furnished; but except with respect to counts seven and eight.[3] I find as a fact that the government failed to tie in sufficiently the dates and substance of the calls.

Conclusion

I, therefore, find defendant guilty as charged in counts seven, eight, nine, ten, eleven, twelve and thirteen, and not guilty as charged in the first six counts.

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[3] The particulars with respect to counts seven and eight were as follows:

"Count VII. On August 6, 1957 from Silver Spring, Maryland to Suffolk, Virginia. It is alleged that the defendant made this telephone call, using the name 'George Simon'. The defendant advised Culpepper that because he had been out of his office he had been unable to mark Culpepper's bets, and as a result Culpepper was a large sum of money behind."

"Count VIII. On August 9, 1957 from Annapolis, Maryland to Suffolk, Virginia. It is alleged that the defendant made this telephone call, using the name 'George Simon'. The defendant advised Culpepper that Culpepper was still $1,500.00 behind, that Culpepper should send that amount to Annapolis, Maryland to Larry Ford, and that if Culpepper sent the money, the defendant would be able to mark bets in the future."